IN THE

SUPREME COURT OF OHIO.

THE CINCINNATI GAS LIGHT AND COKE COMPANY,

PLAINTIFF IN ERROR

VS.

THE VILLAGE OF AVONDALE,

DEFENDANT IN ERROR.

ERROR TO THE DISTRICT COURT OF HAMILTON COUNTY.

BRIEF,

ON MOTION FOR LEAVE TO FILE PETITION IN ERROR.

By E. A. FERGUSON,

Counsel for Plaintiff in Error.

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STATEMENT OF THE CASE.

The plaintiff was incorporated by a special act of the General Assembly of April 3rd, 1837. (See 35, Ohio L. 420.)

The first section enacts, that certain persons therein named and their associates are thereby—

"created a body corporate and politic, with perpetual succession, by the name and style of 'The Cincinnati Gas Light and Coke Company,' and by that name they and their successors shall be capable in law of contracting and being contracted with, suing and being sued, defending and being defended, in all courts and places, and in all matters whatsoever; with full power to acquire, hold, occupy and enjoy, all such real and personal estate as may be necessary and proper for the construction, extension and usefulness of the works of said company, and for the management and good government of the same," etc.

The second section defines the powers of the company as follows:

"The corporation hereby created shall have the full power and authority to manfacture and sell gas, to be made from any or all of the substances, or a combination thereof, from which inflammable gas is usually obtained, and to be used for the purpose of lighting the city of Cincinnati, or the streets thereof, and any buildings, manufactories, public places, or houses, therein contained, and to erect necessary works and apparatus, and to lay pipes for the purpose of conducting gas in any of the streets or avenues of the said city."

The sixth section is as follows:

"SEC. 6. Any future legislature may alter, modify, or repeal this act."

The Act of March 20th, 1859, extended the privileges of the company by enacting:

"That it shall be lawful for any gas company, in any city or incorporated village in this State, organized in pursuance of any of the laws of the same, to extend their pipes used for conveying gas to the various localities and inhabitants of such city or incorporated village to any point, place or places, in the vicinity of such city or incorporated village, outside the corporate limits thereof; provided; the right of way be obtained from the corporate or other authorities, or of any person or persons, place or places, to be affected by such extension."

1 S. & C. 351.

The municipal code, which took effect July 1st, 1869, enacted as follows:

"SEC. 199. All cities and incorporated villages shall have the general powers hereinafter mentioned, and may provide by ordinance for the exercise of the same.

* * * * * *

"18. To provide for the laying down of gas pipes, to lay off, establish, open, widen, straighten, extend, improve, keep in order and repair, and to light, streets, alleys, public grounds and buildings, wharves, landing places, bridges and market spaces, within

the corporation, including any portion of any turnpike or plank-road therein, surrendered to, or condemned by the coporation."

66 Ohio L. 180, 182.

On the 27th day of April, 1871, the council of the village of Avondale passed an ordinance to provide for lighting the village with gas; and on the 24th day of May, 1871, a contract embodying the provisions of the ordinance and a resolution in regard to the right to lay pipes in the Cincinnati and Xenia Turnpike-road, was entered into between the plaintiff and the village.

This contract is Exhibit "A" to the petition and bill of exceptions, and will be found in full in the Record, pp. 3–9 and 60.

The substance of the contract is that the village grants to the company the exclusive privilege of extending its gas pipes and mains through the avenues, streets, etc., of the village, for the purpose of conveying gas to it and its citizens, all to be done at the expense of the company, as required of it by the city of Cincinnati, except that the first cost of restoring the avenues, streets, etc., to their original condition after the mains and connections were laid, was to be paid for by the village, but the repairs of mains, pipes, and connections was to be at the expense of the company.

Sec. 1, Record, pp. 3, 4, 60.

It is also provided, that the village shall pay the company the actual cost of the mains, and the actual cost of laying the same and restoring streets, etc., to proper condition, upon which actual cost of mains, laying same, and restoring streets, etc., the company is to pay the village six per cent interest per annum, payable semi-annually. "And said village shall pay said company for making and laying connections between said mains and the said lamp-

posts, and the pipe leading to and including the burner, and the setting of each post complete, the sum of fourteen dollars, said village furnishing the posts and lamps and lanterns only."

Sec. 3, Record, pp. 5, 61.

The village was also to procure, at its own expense, the right to lay gas pipes or mains in the turnpike-road and avenues under the control of incorporated companies leading thereto from Cincinnati or within the village, and to vest the exclusive enjoyment of *said right* in the company.

Sec. 2, Record, pp. 4, 61.

This was done, as will be seen by the contract.

Record, pp. 8, 64, 65.

In consideration of the privileges so granted and procured, and the payments to be made by the village, the company was to furnish and lay gas mains of such size as it should deem suitable for the present and prospective needs of the village, *in certain named streets*, the distance so to be laid in the first instance not to be less than three nor more than three and one-half miles, AND THEREAFTER AS SHOULD BE AGREED ON, the company locating thereon street lamps for public use as follows: two upon diagonal corners at each street intersection, and between the two so located others at a distance of about one hundred and thirty-four feet apart.

Sec. 3, Record, pp. 4, 5, 61.

The fourth, fifth, and ninth sections read as follows:

"SEC. 4. That in further consideration of the privileges hereby granted, the said company and its successors shall furnish at said lamp posts to said village such quantity of gas as may be required for the lighting of the public lamps, and shall clean, light, and keep lighted, and in ordinary repair, said lamps, for the same

time and price, payable at the same times, as said company now does for the city of Cincinnati; the burners and other conditions being also the same as those now in use and force in said city, and the quality of gas furnished to be the same as for said city."

"SEC. 5. The price at which said company shall furnish gas to the public buildings of said village, and to the citizens and private consumers, shall be the same for each thousand cubic feet so furnished as the prices respectively for gas furnished to the public buildings and private consumers in the city of Cincinnati, and under the same regulations and conditions."

"SEC. 9. The contract made under this ordinance shall terminate: 1st, upon the annexation of said village to said city, before January 1st, 1880; 2nd, on the first day of January, 1880, at the option of the gas company, but it is understood and agreed that, in case annexation shall not have taken place as aforesaid, and the said gas company shall continue after said January 1st, 1880, to furnish said city and its citizens with gas, the said gas company shall have the right to, and will continue to furnish gas to said village and its citizens at the same price, and upon the same terms and conditions, as to the said city and its citizens after said date, *excepting wherein this contract differs from that of the city*, and said company to pay interest on said cost of mains, as aforesaid, to said village. And should the gas company, at the termination of its contract with the city of Cincinnati, fail to furnish gas to Avondale, then it will abandon to said village its right to supply gas under this contract. Gas to be continued to be supplied at same prices to public and private consumers as the city and citizens of Cincinnati pay for the same."

Record, pp. 5, 6, 7, 62, 63.

The second, third, fourth, and fifth statements of the agreed statement of facts contained in the bill of exceptions (see Record, pp. 57–58), are as follows:

"II. That after the execution of the contract of May 24th, 1871, the said company furnished and laid gas mains as provided by the third section of the ordinance of said village, passed April 27th, 1871, from the limits of Cincinnati into the streets named in said section, and said village paid said company the actual cost of said mains, and the actual cost of laying the same originally, and restoring the streets to proper condition, and the said village also paid the said company for making and laying connections between

said mains and the lamp posts located as provided in said section, and the pipe leading to and including the burners, and the setting of each post complete, the sum of fourteen dollars per post, said village furnishing the posts, and lamps or lanterns."

"III. That up to the first day of March, 1879, the plaintiff furnished gas for the public lamps in the defendant corporation, to burn from sunset to sunrise of each night, according to the table hereinafter referred to, marked 'Exhibit No. 2,' and was paid therefor by defendant."

"IV. That on the 13th day of February, 1879, the council of the village of Avondale, the defendant herein, duly passed an ordinance No. 215 entitled, 'an ordinance to fix the quantity of gas required to be furnished for the public lamps in the village,' a true copy of which ordinance is set out in the second defense to the first cause of action, and the defendant delivered a certified copy thereof to the plaintiff on the 14th day of February, 1879, and that an ordinance No. 256, a copy of which is hereto attached and made part hereof, marked 'Exhibit No. 1,' was passed by said council on the 1st day of April, 1880, and a true copy thereof served upon plaintiff upon April 2nd, 1880."

"V. That the plaintiff continued thereafter down to the commencement of this suit, to light the public gas lamps in said village, and burn them from sunset to sunrise, according to said table 'Exhibit No. 2,' and monthly the plaintiff rendered accounts thereof to the defendant, which the defendant refused to pay, but the defendant offered to pay for the quantity of gas furnished, in accordance with the requirements of the ordinance of February 13th, 1879, hereinbefore set forth, and demanded accounts thereof which the plaintiff refused to render."

The opening clauses of section one of both ordinances, numbers 215 and 256, read, with exception of dates, as follows:

"SEC. I. Be it ordained by the council of the village of Avondale that, from and after * * *, the Cincinnati Gas Light and Coke Company be required to furnish, at the lamp posts in said village, the following quantities of gas for lighting the public lamps, *in pursuance of the contract between the village and said company, dated May 24th*, 1871, *to-wit:*"

Record, pp. 13, 68.

The time table, Exhibit No. 2, known as the "all night" time table, was adopted by the council of the city of Cincinnati, on the 1st day of May, 1863, and was the one in force and according to which the city of Cincinnati was furnished gas by the plaintiff, at the date of the contract of May 24th, 1871, between the plaintiff and defendant, and continued to be until June 15th, 1877, when the city council of Cincinnati passed a resolution, requiring gas to be furnished to the public lamps of the city, under what is called the "Philadelphia moon time table," under which the city was subsequently furnished gas until February 7th, 1880, when said resolution was rescinded and the all night time table, as shown by Exhibit No. 2, was restored.

Record, pp. 59, 69.

The defendant having refused to pay for the gas furnished according to the all night time table, the plaintiff brought in the Court of Common Pleas of Hamilton county, on the 7th day of May, 1880, the present action to recover the amount due it on the account, Exhibit B, to the petition for supplying with gas, lighting, extinguishing, and keeping in order the public lamps of the defendant, as per time table and contract, from March 1st, 1879 to May 1st, 1880.

Record, pp. 1, 2, 59, 66.

There was a second cause of action stated in the petition, but as it was dismissed by the plaintiff on the 17th of December, 1881, no trial was ever had on it, and it is not therefore in this case.

Record, pp. 2, 42.

The defendant answered first, denying the validity of the contract, and secondly, that by an ordinance passed Feb-

ruary 13th, 1879, the village had determined the hours when the lamps should be lighted and extinguished, and that for the amount of gas furnished during those hours it had always been ready to pay, but that it had not the means of determining the amount that was due for those hours, until the company furnished the amount; that it had requested that to be done, but the company had not complied with its request; and as to the excess over and above the amount furnished during the hours named in the ordinance of February 13th, 1879, it denies its liability to pay.

Record, pp. 12, 13.

After certain rulings on the pleadings not now necessary to state, the action on the account was tried on the 9th day of March, 1882, at the January term of the year 1882, of the Court of Common Pleas.

Record, p. 19.

The Court found the issues joined for the plaintiff, on the ground that the agreement set out and referred to in the petition, was a valid and binding contract; that by its terms the plaintiff was entitled to furnish, and the defendant bound to receive gas for lighting the public lamps of the village of Avondale, according to the all night time table. Thereupon, the defendant moved for a new trial, which being overruled, and judgment entered for plaintiff for the amount of its account with interest after deducting an admitted payment of $2,000, the defendant took a bill of exceptions, and filed a petition in error in the Hamilton County District Court.

Record, pp. 19, 31, 44.

The cause in the District Court was argued and submitted on the 8th of January, 1883, and on the 7th of

June following the judgment below was reversed and the case remanded for a new trial, the District Court holding that the judgment for the amount in excess of the quantity of gas required to be furnished by the ordinance of February 13th, 1879, was erroneous.

Record, p. 47.

9 Cincinnati Weekly Law Bulletin, 321–2.

On the 7th of December, 1883, an agreed statement of facts with exhibits was filed, and on the 10th of the same month, at the November term of the Court of Common Pleas, the case was tried thereon and judgment rendered for the plaintiff as if the amount of gas furnished had been only that required by the ordinances of the defendant, without interest or costs. The plaintiff, having moved for judgment on the pleadings and agreed statement for the whole amount due according to the account, Exhibit B, after deducting the payment of $2,000, and for a new trial, and, these motions having been overruled, excepted to the rulings, and took a bill of exceptions thereto.

Record, pp. 56, 74.

On the 18th of December, 1883, the plaintiff filed its petition in error in the District Court, assigning the following errors:

1. The Court erred in overruling the motion of the plaintiff to find upon the pleadings and agreed statement of facts, the issues joined for the plaintiff, and to assess the amount due from the defendant to the plaintiff for gas, etc., furnished from March 1st, 1879, to May 1st, 1880, at the amounts stated in said account, Exhibit "B," to said agreed statement of facts, with interest thereon to the first day of the November term, 1883, of said Court of Com-

mon Pleas, after deducting therefrom the payment of two thousand ($2,000) dollars, with interest thereon from October, 2nd, 1879, to the first day of said term, and to enter judgment for the plaintiff for the balance.

2. The Court erred in assessing the amount of the plaintiff's recovery.

3. The Court erred in its findings and decision, and in its conclusions of law.

4. The Court erred in overruling the plaintiff's motion for a new trial.

Record, pp. 74, 75.

At the January term of the present year the District Court affirmed the judgment of the Common Pleas, and to reverse this judgment of affirmance and the one reversing the first judgment of the Common Pleas, and to have such judgment as should have been rendered in the Court below, the present petition in error is filed.

ARGUMENT.

It will be seen by the foregoing statement that the contract between the parties has, as to the right of way and laying of mains, setting lamp posts, and making connections, been executed. All that was to be done by either party has been performed, including the payments to be made by the village to the company. As to the executory part, namely, the supply of gas to the public lamps, up to the first day of March, 1879, the plaintiff furnished gas for them according to the all night time table in use in the city of Cincinnati when the contract was made, and the monthly bills therefor, and for cleaning and keeping in repair the lamps, were paid by the defend-

ant. This was the action of the parties under the contract, and it should be kept in view in determining the questions now raised. It is claimed by the defendant that the contract was invalid for want of power upon the part the village to enter into it, and that, if valid, a proper construction gives the defendant the right to prescribe the time during which the public lamps shall burn. It is proposed to consider these questions together with another, namely, is the defendant in a position to question the validity of the contract in this action?

I.

We do not understand that the power of the village to contract for gas as a means of lighting the public lamps to be disputed. Both parties were competent to contract about the subject matter, so far as it relates to a supply of gas; and the contract is admitted to be duly executed under their respective corporate seals. The rule, therefore, which is to determine the question as to its validity can not probably be better expressed than it is by Baron Martin, in a case arising under the English municipal corporation act, *Payne* v. *Mayor of Brecon*, 3 Hurlston & Norman,572:

"It seems to me that the law is properly laid down by Parke, B., in the case of *The South Yorkshire Railway Company* v. *The Great Northern Railway Company*, 9 Exch. 84, where he says: 'Generally speaking, all corporations are bound by a covenant under their corporate seal, properly affixed, which is the legal mode of expressing the will of the entire body, and are bound as much as an individual is by his deed. * * * But where a corporation is created by an act of Parliament *for particular purposes*, then, indeed, another question arises. Their deed, though under the corporate seal, and that regularly affixed, does not bind them if it appears by the express provisions of the statute creating the corpora-

tion, or by necessary or reasonable inference from its enactments, that the deed was *ultra vires;* that is, that the legislature means that such a deed should not be made.' Therefore, in order to avoid this covenant, it must appear that it was a covenant which the corporation was forbidden to enter into."

Per Martin, B.—

3 Hurlston & Norman, p. 577.

The question, then, appears simply to be this: What enactment of the statutes relating to the powers of the defendant forbid its entering into an agreement whereby the plaintiff should furnish such quantity of gas as should be required for lighting the public lamps of the defendant, and should clean, light, *and keep lighted* and in ordinary repair, said lamps *for the same time and price*, payable at the same times, as the plaintiff *then did* for the city of Cincinnati; the burners and other conditions being also the same as those *then* in use and force in said city, and the quality of gas furnished to be the same as for said city?

Before considering the objections made and the arguments used by the defendant's counsel and the Court below, let us consider the situation of the parties when the contract was entered into. Nothing to the contrary appearing on the Record, the contract must be assumed to be made *bona fide* on both sides.

The village of Avondale is contiguous to and its territory is almost surrounded by that of Cincinnati. It is evident from the contract that it was in the contemplation of the parties that probably before the year 1880 the village would be annexed to and become part of the city. Care was, therefore, taken by its council, in the proposition it made to the plaintiff's company, by the ordinance of April 27th, 1871, to secure the same quantity of gas and the same burners for its public lamps that the city then used.

The price for both public and private consumption was to be the same as in the city, as was also the quality of the gas.

Now, what law was controvened by such requirements?

It is said in the opinion of the District Court, and doubtless it will be urged here, that,

"The provisions of sections four and five of the contract are in effect an attempt to transfer from the legislative authorities of the village of Avondale to the legislative authorities of the city of Cincinnati all regulation as to the quantity and price of gas furnished to the village in contravention of the well known principle, that legislative power can not be transferred or ceded."

Avondale v. *Gas Co.*, 9 Weekly Cincinnati Law Bulletin, 321, 322.

In the first place, it is to be observed that the ordinance of April 27th, 1871, was not passed in the exercise of the legislative powers conferred for purposes of police regulation or municipal government, but in the exercise of the power to contract. It was not an ordinance of a general nature, but one to accomplish a specific object—the lighting by gas of a defined portion of the defendant's territory. It was a contract ordinance.

"It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property, whether to be exercised by legislation or the appointment of officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence or business. As to the first, the municipal corporation represents the State in discharging duties incumbent on the State; as to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals."

Per Gholson, J.—

Western College v. *City of Cleveland*, 12 Ohio St. 377.

"The power of prescribing rules and regulations is sometimes called judicial and sometimes legislative. It would perhaps be more accurate to say that it *partakes of the nature* of those powers, and, therefore, is attended with the same protection to those who exercise it; since it is perfectly clear that the legislature is incompetent to devolve any portion of its legislative power upon a corporation, or to take from the judicial tribunals any part of the judicial power of the State where the constitution has lodged it. *C. W. & Z. R. R. Co.* v. *Clinton County*, 1 Ohio St. Rep. 77. In such cases, the corporation exercises a wholly subordinate function, and rather gives *detailed application* to legislation, than originates new rules; while its by-laws are to be deemed in the nature of compacts between the corporators, rather than acts of legislation."

Per Ranney, J.—

City of Dayton v. *Peace*, 4 Ohio St. 100.

Hence, in accordance with the principles laid down in the foregoing cases, it was decided in the case of *State* v. *Cincinnati Gas Light and Coke Company*, 18 Ohio St. 263, that, under the general power to cause the city to be lighted, the city council might, by contract, provide for lighting the city by gas; but that, as the power to alter, modify, or repeal the company's charter was expressly reserved therein, it was competent for the legislature to empower the city council to regulate the price of gas, although this discretionary power of regulation might have been vested elsewhere.

"And it seems clear that it is the statute itself, and not the action of the city council under it, which alters or modifies defendant's charter. It is the legislative act which prescribes the new rule of corporate action, though the city council is made an agent in its administration."

Per Scott, J.—

State v. *Cincinnati Gas-light and Coke Co.*, 18 Ohio St. 299.

It will therefore be seen, that when it is said that the defendant has transferred its legislative authority, or been deprived of its power to regulate the quantity, quality, and

price of gas furnished, such authority or power must be shown to exist by express legislative enactment. It is a claim of the defendant as a subordinate agency of the State to give detailed application to legislation. Reliance for this power was placed by counsel for the defendant in the Court below on sections 2478, 2479, and 2485 of the Revised Statutes, which sections, with section 2482, are as follows:

"SEC. 2478. The council of any city or village, *in which* gas companies, or gas light and coke companies, *may be established*, are hereby empowered to regulate, from time to time, the price which such gas or gas light and coke companies may charge for gas furnished by such companies to the citizens, public grounds and buildings, streets, lanes, alleys, avenues, wharves, and landing places; and such gas light or gas light and coke companies shall in no event charge more for any gas furnished to *such corporation* or individuals than the price specified by ordinance of *such council;* and such council shall also have power to regulate and fix the price which such companies may charge for the rent of their meters."

"SEC. 2479. In case the council fixes the minimum price at which it requires any company to furnish gas to the citizens, or public buildings, or for the purpose of lighting the streets, alleys, avenues, wharves, landing-places, and public grounds, for a period not exceeding ten years, and the company assents thereto by written acceptance filed in the office of the clerk of the corporation, it shall not be lawful for the council to require such company to furnish gas at a less price during the period of time agreed on, not exceeding ten years, as aforesaid."

"SEC. 2482. A neglect to furnish gas to the citizens and other consumers of gas, or to the corporation, by any company, in accordance with the prices fixed and established by the council, from time to time, shall forfeit *all rights* of such company *under the charter by which it has been established;* and the council may proceed to erect, or, by ordinance, empower any person to erect, gas works for the supply of gas to such corporation and its citizens; provided, that nothing in this section, or in sections *twenty-four hundred and seventy-nine* and *twenty-four hundred and eighty,* shall operate to impair or affect any contract heretofore made between any municipal corporation and any gas light and coke company."

"SEC. 2485. It shall not be lawful for any council to agree by

ordinance, contract, or otherwise, with *any person or persons, for the construction or extension of gas-works*, for manufacturing or supplying the corporation or its inhabitants with gas, which shall give or continue to any person or persons making such agreements with the council the exclusive privilege of using the streets, lanes, commons, or alleys, for the purpose of conveying gas to the corporation or the citizens thereof, or which shall deprive the council of the right to designate the kind of meter to be used for the correct measurement of the gas furnished under such agreement, and to provide for inspecting or regulating the same, or which shall not specify the exact quality of the gas to be furnished, and reserve to the council the right to enforce an exact compliance with such specification, under such rules as the council may prescribe; nor shall the council make any such agreement which shall not secure to the council the right to purchase *such works, and all the appurtenances belonging thereto*, at at any time within the existence of such contract or agreement."

Do these provisions apply to the case of a gas company not *established* within a municipality? The consequence of the company's disobeying the exercise of the power conferred by section 2478, is a forfeiture of all its rights under its charter (section 2482); and therefore the section is to be strictly construed and limited to the cases provided for. The councils that are empowered are those of cities and villages *in which* gas companies or gas light and coke companies *are* or may be *established;* and the power given is to regulate from time to time the price to be charged for gas and rent of meters. Nothing is said in this section about the quality or quantity of gas. If the argument of defendant be sound, it leads to the conclusion, that if the plaintiff should neglect to furnish gas at the price fixed by the ordinance of the defendant, although that price might be lower than that fixed and paid in Cincinnati, yet all the plaintiff's rights under the charter by which it had been established would be forfeited, for such is the penalty provided by section 2482 for disobedience. Certainly such was not the intention of the law. Neither

the Cincinnati Gas Light and Coke Company nor its gas-works are *established* in the village of Avondale. Nor has section 2485 any application to the present contract. It was not made "with any person or persons for the construction or extension of *gas-works* for manufacturing or supplying the corporation or its inhabitants with gas." The plaintiff had no corporate power to enter into such a contract. Its powers were limited to owning the necessary real estate whereon to construct and extend its gas-works in Cincinnati, for manufacturing and supplying that corporation and its inhabitants with gas. Added to this was the power, under which it made the present contract, "to extend its *pipes used for conveying gas to the various localities and inhabitants*" of Cincinnati, to any point or place in the vicinity of the city, outside of its corporate limits. How, under this power, could the plaintiff agree to furnish gas of a different quality from that furnished Cincinnati, or to the purchase by Avondale of its gas-works "and all the appurtenances belonging thereto," especially as it was bound by the Conover Contract (Record, p. 70) to sell the same to the city. The exact quality of gas to be furnished was specified in the contract made, and it was a physical impossibility to furnish any other through pipes which supplied the city. Yet it is said in the opinion of the District Court, and found as a conclusion of law in the Court of Common Pleas, that because the gas was to be always of the same quality as that furnished the city, it was so far void. Was there ever a more absurd conclusion? The truth seems to be, that there was a vague idea about an undefined "legislative power" vested in the municipal councils; when, strictly speaking, there is no such power, and it would be as correct legally to speak of "the parliamentary power" of Stratford-on-the-Avon, as of "the legislative power" of Avondale. What is called the

legislative power is, in this State, simply the power to make by-laws expressly authorized by statute.

"Where it is necessary for the accomplishment of the objects of their incorporation, a body politic has, as an incident to it, the power of making by-laws and of enforcing them by penalties; and such by-laws, in the case of municipal corporations and of other corporations intrusted with local, popular, or territorial government, will bind both members and strangers, and not members of the corporation only.

"A by-law is a rule obligatory on a body of persons or over a particular district, not being at variance with the general laws of the realm, and being reasonable and adapted to the purposes of the corporation; and any rule or ordinance of a *permanent character*, which a corporation is empowered to make, either by the common or statute law, is a by-law. It is a rule made *prospectively*, and to be applied whenever the circumstances arise for which it is intended to provide."

Grant on Corporations (Eng. ed.), p. 76.

Again it is objected that the contract is of perpetual duration, unless the village was annexed to the city, or the company elected to terminate it by January 1st, 1880, or should fail to furnish gas under it after the termination of its contract with Cincinnati. It was said that upon the terms of this contract, as it was construed by the plaintiff, the village, without reserving to itself any control as to the quantity of gas to be furnished by the company, and without regard to the progress that may be made in the means of lighting the public streets, which may at no distant day involve the dispensing with all other means and the substitution of electricity, has bound itself to pay perpetually to this company the price for, and to take the quantity of gas that was paid for and consumed by Cincinnati, in 1871, and it was argued that the legislature contemplated the progressive growth of municipalities and the change in their circumstances, and in the cost of the

materials used for lighting, and the progress in the art and means of procuring light; that the danger sought to be guarded against, by the legislation above referred to, was the making by municipal authorities of improvident contracts with gas companies for the supply of gas, improvident especially in the particulars of the price and quantity of gas to be furnished, and the duration of the contract at any fixed price, without legislative control or supervision, and that, so far as the legislative purpose, and the danger which the legislature was seeking to provide against were concerned, there could be no difference between the gas companies established within the corporate limits and those established without the corporate limits, who may extend their mains within the corporation.

The answer to this argument is, that had the legislature intended to provide as claimed, it would have been expressed and not left to inference or argument about the policy of the law. It has provided for regulating the price of gas in municipalities where gas companies are *established*, and what contracts for the construction or extension of *gas-works* shall and shall not contain, but it has nowhere provided for the quantity of gas to be furnished, nor the duration of a contract for a supply of gas. These matters are left to the discretion of the municipal councils, subject, however, to the control and supervision of the general assembly. For it is not true, as it seems to be taken for granted, that if contracts of this character should be made which should prove improvident in any of the particulars stated, there would be no remedy. Under the decisions of this Court, both parties to this contract are subject to legislative control, and both must be presumed to have dealt and bargained with a knowledge of this supervisory power, and that any contract they entered into,

was subject to be altered or modified at the will, not of either of them, but of the legislature. It could make the contract impossible of performance by the company, by repealing its charter and winding up its affairs, or prohibiting the use of gas, as a means of lighting the streets of the village when, in the progress of the art of illumination, electricity shall be substituted for all other means. It could likewise regulate by some designated agency, the quantity, quality, and price of gas to be furnished; but, until the general assembly has so willed, it would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the benefit of which it retains.

"As the defendant's charter was completely in the power of the legislature, and could be modified at pleasure, or wholly repealed, there is no reason to suppose that the defendant was intended to be exempted from the operation of a general law imposed on gas companies generally."

The State v. *Cin. Gas Co.*, 18 Ohio St. 263, 269.

"Where a corporation, acting under a special charter, is invested with franchises to be exercised to subserve the public interest, the terms upon which the corporation may be required to discharge its duties to the public, are subject to legislative supervision and control, unless it clearly appears from the terms of its charter that it was the intention to exempt it from such interference."

The State v. *Columbus Gas Co.*, 34 Ohio St. 572.

"But into all contracts whether between states and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations *or of the community* to which the parties belong; they are always presumed and must be presumed to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. *Every contract is made in subordination to them, and*

must yield to their control, as conditions inherent and paramount, whenever a necessity for their execution shall occur."

Per Daniel, J.—

West River Bridge Co. v. *Dix*, 6 Howard U. S., p. 532.

II.

Recurring to what has been heretofore stated in regard to this contract, that if the village had power to make it, its due execution under the corporate seals of the parties is admitted, that there being nothing to the contrary in the Record, it must be assumed to have been *bona fide* made by both parties, that the mains and connections have been laid and the lamp posts set under it, that the village had paid the cost of the mains, and of the laying and setting as required by the contract, that the company has paid the interest on this cost, and kept the mains, connections, lamp posts, and other fixtures in repair, and lighted and extinguished the lamps, the question arises whether in this action the defendant is in a position to refuse to receive and pay for gas according to the contract. Or, in other words, can it retain the advantage without bearing the burthen imposed by its obligation. Can it ratify that part which is beneficial to itself, and reject the remainder? *Qui sentit commodum, sentire debet et onus.* He who derives the advantage ought to sustain the burthen.

"The principle, which must, I think, govern this case, is one of *universal application;* namely, that where a contract has been entered into by one man as agent for another, the person on whose behalf it has been made, can not take the benefit of it without bearing its burthen. *The contract must be performed in its integrity.*

"Here the appellant as agent for the owner now represented by the respondents, stipulated for certain benefits in consideration of certain burthens which he undertook to bear, and certain labors which he undertook to perform. If he had authority to enter into such a contract, the principal is of course bound. If he had not

authority, the principal may repudiate the contract; but he can not take that part which is beneficial to him without performing that which is onerous."

Per Lord Crauworth—

Bristow v. *Whitmore*, 9 H. L. Cases, 404.

"If an agent makes a contract on behalf of his principal, whether with or without authority, the principal can not at once approbate and reprobate it. He must adopt altogether, or not at all; he can not at the same time take the benefits which it confers, and repudiate the obligation which it imposes."

Per Lord Kingsdown—

Ibid, p. 418.

"The principle on which this doctrine depends is, that a person shall not be allowed to benefit by and repudiate an instrument, but that if he chooses to take the benefit which it confers, he shall likewise discharge the obligation, or bear the *onus* which it imposes."

Broom's Maxims, p. 635.

In the present case the village claims the benefit of the contract, for its ordinances of February 13th, 1879, and April 1st, 1880, both require the company to furnish gas at its lamp posts, "in pursuance of the contract between the village and said company, dated May 24th, 1871." (Record, pp. 13 and 68.) And the judgment of the Court below was, that the contract was only void, "so far as it fixes price, quality, and quantity of gas to be furnished to defendant." (Record, pp. 55, 73.) So that the plaintiff is left bound by all its stipulations, bound to pay six per cent on the cost of mains, etc., to light, keep lighted, clean, extinguish, and keep in order the public lamps, and to repair the mains and connections of the defendant, while the latter is required to take only so much gas as it may choose at such price as it may fix. Such, we submit, is not the law of the case; but, on the contrary, so long as the defendant claims the benefits of the contract, it is bound to perform its obligations.

III.

Another question made was as to the proper construction of the fourth section of the ordinance of April 27th, 1871, which is as follows :.

"That in further consideration of the privileges hereby granted, the said company and its successors shall furnish at said lamp posts to said village, such quantity of gas as may be required, for the lighting the public lamps, and shall clean, *light and keep lighted*, and in ordinary repair said lamps *for the same time* and price, payable at the same times as said company *now does* for the city of Cincinnati; the burners and other conditions being also the same as those *now in use and force* in said city, and the quality of gas furnished to be the same as for said city."

It was claimed by the defendant that, upon a proper interpretation of that section, it had the right to prescribe the time during which the public lamps should burn, and so fix the quantity of gas required. It was said that the price paid in the execution of the contract had been a changing price, being reduced to the village of Avondale at the same rate that it was reduced to the city of Cincinnati, in accordance with a computation made of the price paid for gas by five other cities named in the Conover contract with Cincinnati. (Record, p. 70.) And it was argued, that in construing the language of the fourth section, there could be no possible distinction between the quantity to be consumed and the price to be paid; that if the contract specifies the time during which the gas that is required for lighting the lamps shall be furnished, to wit, the same time that during that precise period the gas company was furnishing it to the city of Cincinnati, it specifies the price also, namely, the same price as at that precise period the company was receiving from the city. And it was further claimed, that if it be said that this contract meant that the

village was to pay, not the price that was paid by the city at the precise time the contract was made, but the price which the city might, from time to time, pay under the Conover contract, then it would follow, that the time during which the lights were to be lighted, was to be the time which might be required by the city of Cincinnati, and that it appeared that the time for which this suit seeks to recover (the all-night table), was not the time for which the gas company was furnishing gas to the public lamps in the city at the same period.

At the outset, it should be noticed that both parties have put a practical construction on the fourth section. From the beginning, the time of lighting and extinguishing the public lamps of the village was according to the all-night time table, and no claim was made by either party when the city adopted, in June, 1877, the "Philadelphia moon time table," that the time of lighting the village lamps should conform to it, but the company continued to light them as before, from sunset to sunrise, during the whole of the period that the moon table was in force in the city, and the monthly bills therefor were paid by the village without objection. Nor was the claim made when the dispute in the present case arose, that the company should conform to the moon table; on the contrary, it is a distinct claim of a right under and in pursuance of the contract of May 24th, 1871, to fix the time, by ordinance of the village council, during which the public lamps shall burn; and the question is, does a proper construction of the fourth section give the council such a power?

The quantity of gas consumed depends upon two things, the kind of burner used and the length of time the lamps are kept lighted. As to the former, the stipu-

lation is express; it is that the burners should be the same as those then in use and force in the city. If the city had, therefore, seen fit to require a greater illuminating power, by changing its burner to, say the "Bray" burner, which would consume five times as much gas as the street burner in use at the date of the contract, or the "Sugg" burner, which would consume ten times as much, a change of burner could not have been required, by either party, to conform to the change by the city. And so, if the city had adopted a burner which would consume less than the burner in use at the time the contract was made. In neither of these ways could the quantity of gas furnished to the village be increased or diminished.

And it would seem that the contract as to time was equally certain and explicit:

"The said company, and its successors, shall furnish, at said lamp posts, to said village such quantities of gas as may be required for lighting the public lamps, and shall * * * *light and keep lighted* * * * * said lamps, *for the same time* * * * * * as said company *now does* for the city of Cincinnati; the burners and other conditions being also the same as those *now* in use and force in said city."

Surely, if it had been the intention to leave to the village council the power to prescribe the *quantity* of gas to be furnished, more inappropriate language could not have been chosen. If that had been the intention, all that would have been necessary would be to say, that "the said company shall furnish, at said lamp posts, to said village such quantity of gas as may be required *by the council thereof*, for lighting the public lamps, at the price paid to the city of Cincinnati, payable at the same time;" omitting all requirements as to time and burner. The construction claimed by the defendant, eliminates the expres-

sion "*light and keep lighted*," and would make this part of the section read, "said company, and its successors, shall furnish, at said lamp posts, to said village such quantity of gas as may be required for lighting the public lamps (and shall clean and keep in ordinary repair said lamps), for the same price, payable at the same time, as said company does for the city of Cincinnati, etc." But every word and expression used must be given effect, and this can only be done by the construction which the parties put upon it when the contract was made, and the usage under it for years. The price was known by the parties to vary according to the Conover contract, but the all-night time table had been in force since May, 1863, and no change in that was contemplated by either. And, after all, the defendant's argument would only lead to the conclusion, that the price was fixed, by the terms of the contract, at the price paid by the city at the time the contract was made. It would not change the time of lighting and keeping lighted, or the burner to be used. But, as said before, acts of the parties are the best evidence of what they meant, and should determine the construction to be put on the clause, if there be any doubt.

IV.

As the agreed statement of facts is to be regarded as a special verdict of a jury, or a special finding of facts by the Court, expressing the result of the proofs made by both parties, the Court below should have, for the reasons above stated, granted the plaintiff's motion for a judgment for the amount of the account exhibit "B" with interest, less the admitted credit of $2,000 and interest.

Revised Statutes, sec. 5121, 5327.

Ish v. *Crane*, 13 Ohio St. 574, 580.

McGonnigle v. *Arthur*, 27 Ohio St. 252, 257.

V.

As there was no tender, or payment into Court of the amount admitted to be due, nor offer to confess judgment for the same, the plaintiff was entitled to interest and costs.

Revised Statutes, secs. 5137, 5141, 5348.

We therefore ask that the judgments of the District Court may be reversed, and that this Court will proceed to render such judgment for the plaintiff as the Court below should have rendered.

E. A. FERGUSON,

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